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Regionalization of Natural Resources

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REGIONALIZATION OF NATURAL RESOURCES

EXTENSION OF REMARKS

OF

HON. EDWARD T. TAYLOR

OF COLORADO

IN THE HOUSE OF REPRESENTATIVES

Tuesday, December 21, 1937

ANALYSIS OF AND COMMENTS ON THE MANSFIELD BILL (H. R. 7365)

Mr. Taylor of Colorado. Mr. Speaker, on June 3 last Representative Mansfield, the chairman of the Committee on Rivers and Harbors, introduced a bill (H. R. 7365) to provide for the regional conservation and development of the national resources, and for other purposes. The bill contains 53 pages.

There was a companion bill introduced at the same time in the Senate by Senator Norris—S. 2555. Those bills are of almost unlimited scope. Their objects are "to develop, integrate, and coordinate plans, projects, and activities for or incidental to the promotion of navigation, the control and prevention of floods, the safeguarding of navigable waters, and the reclamation of public lands, to conserve the waters, soil, minerals, and forest resources of the Nation," and so forth. While many of the main purposes of those measures are laudable, insofar as they apply to the waters of the streams throughout the entire arid region of the West they are in bold violation of, and absolutely destructive of, the vested property rights and the established system of development of any western resources by irrigation and reclamation of our public and private lands. They utterly ignore the doctrine of priority of water rights by appropriation, which is the foundation of all the agricultural development throughout the arid West.

The entire delegation in Congress from 13 of the western States are unalterably opposed to the measure in its present

form and we have appeared before that Committee and presented as forcibly as we could, our objections to it. I made an exhaustive statement myself before that committee about 10 days ago, presenting what I believe are the sentiments and rights of the people of those States concerning the waters within that region. At that time, I presented to the committee "An analysis of and comments on the Mansfield bill, H. R. 7365," as it would affect our western States. That analysis was prepared by the Colorado Water Conservation Board, which is an official organization headed by the Governor and created by law with authority to speak for the State of Colorado. That analysis has been prepared by some half dozen of Colorado's ablest lawyers, including our attorney general and several eminent engineers, including our State engineer. I feel very earnestly that Congress and the country should be fully advised as to the effect that the regionalizing program would have on the West.

By permission of the House I enclose herewith that analysis, as follows:

ANALYSIS OF THE MANSFIELD BILL, H. R. 7365

A bill to provide for regional conservation and development of the national resources and for other purposes

DIVISIONS OF THE BILL

The bill is 53 pages long. One division is title I, another title II, and a third title III. The first states, among other things, the purpose of the bill, and creates seven regional planning agencies which are to be instrumentalities of the Government, and which are to recommend plans to the President and the Congress of projects and activities for the utilization of water, soil, minerals, and forests of their respective regions.

Title II authorizes, among other things, the President to create regional power authorities to construct, acquire, and operate power plants and to sell or distribute electrical energy, and in connection with such operation to serve also the interests of navigation, flood control, and irrigation. Title II does not provide primarily for projects other than for electrical energy.

Title III authorizes the appropriation of such sums from time to time as may be necessary to carry out the provisions of the act.

THE PURPOSES AND CONSTITUTIONAL GROUNDS OF THE BILL

The purposes of the bill and the constitutional grounds specified in support of the purposes are set forth in title I, section 1, and are to control floods, safeguard navigation, reclaim public lands, conserve the

water, soil, mineral, and forest resources of the Nation, stabilize and increase employment—all to the end of promoting interstate commerce, the national defense, and the general welfare.

TITLE I OF THE BILL DEALING WITH PLANNING AGENCIES ANALYZED IN GREATER DETAIL

Regional planning agencies

One planning agency is created for each of seven specified drainage basins, to wit: The Atlantic seaboard planning agency; Great Lakes-Ohio planning agency; Tennessee Valley planning agency; Missouri Valley planning agency; Arkansas planning agency; Southwestern planning agency; and the Columbia Valley planning agency (sec. 2). Since drainage basins include both streams and tributaries, it follows that the jurisdiction of the agencies would extend to tributaries. The President may redefine from time to time the territorial boundaries of the seven regions (sec. 2).

Regional directors and committees

Each planning agency is to consist of a regional conservation committee or committees, of which a regional planning director shall be a member and the chief administrative officer. All are appointed by the President, and the appointment of the director is to be confirmed by the Senate (sec. 3 (a) (b)). The regional director carries out the policies of the conservation committee (sec. 3 (c)).

"The regional planning agencies shall be subject to the supervision and control of the President * * * for the purpose of insuring appropriate conformity of regional plans to a national policy and appropriate coordination of regional plans" (sec. 4 (a)).

The most important functions of the planning agencies are to study and to devise and submit plans to the President and to the Congress for projects whereby to bring about the most economical use of the Nation's water, soil, mineral, and forest resources, including the control of water run-off (sec. 4 (b)). In doing this the agencies are to cooperate in their investigations with other departments of the Government and to have the right to commandeer the latters' services and information (sec. 4 (b)). So, too, the agencies are to cooperate with the States and public and cooperative agencies (nothing is said, however, about cooperation with private agencies that are not organized on a cooperative basis) in accumulating data and development of plans (sec. 4 (c)).

In submitting plans to the President the agencies shall include recommendations conducive to cooperation among State, Federal, regional, and local agencies in carrying out plans, projects, and activities, and also shall include recommendations for legislation to the same general end (sec. 4 (d)).

Submission of plans

Once a year each regional planning agency shall submit to the President plans for the construction and the undertaking during the succeeding fiscal year of projects in line with the purposes of the bill, namely, conservation and prudent use of the water, soil, mineral, and forest resources; also prevention of floods, safeguarding navigation, reclamation of public lands, conservation of the water, soil, mineral, and forest resources of the Nation (sec. 5 (a)).

If the President approves any of the plans, he is to refer them to the Congress with his recommendations, and he may call upon the agencies for plans for such projects as he desires in carrying out the purposes of the act (sec. 5 (b)). When "plans involve * * * integrated developments traversing the geographic region of two or more regional planning agencies the President may assign or reassign to any one of such regional planning agencies as he finds necessary * * * or appropriate to obtain the advantages of natural and economic boundaries in the planning of such integrated developments" (sec. 5 (b)).

Preparation of plans

Plans shall include projects and activities adapted to conservation and integrated development of water, soil, and forest resources, and include "improved methods of soil conservation, utilization of fertilization and cultivation" (sec. 6 (a) (2)).

Plans shall include "conservation of water for power, irrigation, and other beneficial uses," prudent husbandry of natural resources, and the "integration and interconnection of projects and activities" (sec. 6 (b) (1) (2) (4)).

Plans may include projects to be constructed by various departments of Government or by regional agencies or by the States or by the latters' subdivisions and to be financed by the United States or the States (or the latters' subdivisions) or by both (sec. 6 (c)).

Plans contemplate jurisdiction of planning agencies over tributaries as well as main streams (sec. 6 (a) (1) (3)).

Plans shall classify projects in order of urgency to promote employment (sec. 6 (d)).

Interstate compacts

Consent of Congress is given to States to enter into interstate compacts "(1) to further and supplement on behalf of the States the purposes of this act and (2) to carry out on behalf of the States appropriate projects and activities in relation thereto" (sec. 7).

"Any such agreement or compact shall not become effective or binding upon the States party thereto unless and until it shall have been submitted to and approved by the President after consultation with the regional planning agency within whose geographic region the projects or activities contemplated by such agreement or compact are to be carried out" (sec. 7).

Pollution

Unlawful to pollute streams over which the Congress has jurisdiction under its authority to regulate commerce between the States or with foreign nations. (sec. 8.)

TITLE II. DEALING WITH REGIONAL POWER AUTHORITIES ANALYZED IN GREATER DETAIL

Creation and composition

The President is authorized to create, by Executive order, corporate regional power authorities when and wherever, and as numerous, as he deems best, and regardless of the seven planning regions established by title I of the bill (sec. 201 (a)).

Each power authority is to have an administrator to be appointed by the President and confirmed by the Senate, and a Regional Power Board, whose members (not less than three or more than five, including the director) are to be appointed by the President. (Sec. 201 (c), (d), (e).) The Board determines policies and the Administrator carries them out (sec. 201 (e)).

Some of powers

The power authorities are to have the right to construct and operate power plants and transmission lines and to sell and distribute energy either at wholesale or retail in the cities and in the country; and to the power authorities the President, if he deems best, may transfer by executive order already existing plants operated by other departments (Bureau of Reclamation for instance) or agencies of the Government (secs. 201 (a) 203 (a), (c), (d), (e)).

States, districts, municipalities, and cooperatives are to be preferred over others as purchasers of power (sec. 203 (d)).

Rate schedules for the sale of energy must be approved by the Federal Power Commission (sec. 203 (f)).

The rates, having regard to recovery of cost and to appropriate reserves for maintenance and upkeep and amortization of capital investment over a period of years shall be such as to encourage the widest possible use of electrical energy; and where the generation of energy is only one of several purposes of a project, the cost shall be fairly allocated among the purposes to encourage the widest possible use of water for irrigation and of electric energy (sec. 203 (f) (g)).

Reports

Each power authority shall submit to the President and the Congress annual financial reports of their respective businesses and of the status and progress of their projects and activities (sec. 206 (a)). The Comptroller General may audit (sec. 205 (b)).

Injunctions

Injunctions against the authorities or their representatives are made difficult to obtain, and where temporary injunctions are wrongfully obtained by the plaintiff or complainant the damages, including loss of income, may be assessed against the bond right in the same injunction suit (sec. 207 (b), (c), (d), (e)).

Jurisdiction of courts

The Federal courts are given exclusive jurisdiction of all suits against the power authorities or their representatives (sec. 207 (a), (b)).

Condemnation proceedings

The authorities may maintain suits to condemn both real and personal property for the purposes of the act (sec. 208).

Dams of the United States

All dams now being constructed or hereafter to be constructed anywhere by the United States are, where practicable, to be so constructed as to make possible the generation of power, to the end that water may not be wasted; and adverse reports on such practicability shall be submitted to the President for consideration and final decision (sec. 209).

Receipts

Receipts of each authority go to the Treasury of the United States for the credit of "Miscellaneous receipts" (sec. 211).

TITLE III OF THE BILL

Appropriations

There are hereby authorized to be appropriated from time to time such sums as may be necessary to carry out the provisions of this act (sec. 301).

OBJECTIONS TO THE MANSFIELD BILL, H. R. 7365

A bill to provide for the regional conservation and development of the national resources, and other purposes

INTRODUCTION

While there are arguments for a comprehensive and integrated development of a river system as a whole and for plans whereby to bring such a development about in order to conserve the water, soil, mineral, and forest resources of the Nation, yet the opposing arguments as applied to the Mansfield bill are the more weighty. It is the purpose of these comments to state these objections.

The bill erroneously asserts that the ownership or control of the country's waters is in the Federal Government, thus ignoring in its theory the field of ownership or control that is in the States.

The bill erroneously assumes, both impliedly and expressly, that the ownership or control of the country's waters is in the Federal Government rather than in the States.

The very plans for the comprehensive development of projects and activities along stream systems, regardless of State lines, and the very prohibitions laid down by the bill upon the States, testify to such an implied assumption without the aid of any express declaration.

The bill contains, however, an express declaration. It provides that whenever, by it or any other act of the Congress, any project or activity within the scope of the plans of the Authority, "is entrusted to an authority, such authority shall construct, operate, and carry out such projects or activities primarily for the promotion of navigation, control, and prevention of floods, safeguarding of navigable waters, and the reclamation of public lands. In order to effectuate such primary purposes with the greatest public benefits, and so far as is consistent with such primary purposes, to avoid the waste of water, water power, and other property of the United States, such authority, except as the Congress may otherwise provide, shall have such powers as may be necessary to operate and carry out such project or activities * * *" (sec. 203 (a)).

Here we have an express declaration that classifies the "water" and "water power" as part of the "property of the United States." What "water" is, needs no explanation. What "water power" is, as the term is used in the bill, is not defined, but it probably means such flows of water that as to volume, fall, and location could be used in the production of electrical energy. The point is that both are expressly said to be the "property of the United States."

Undoubtedly the Congress, under the commerce clause of the Constitution, may regulate and protect navigation where it relates to interstate and foreign commerce, and, where there is such a relation, may include flood control, and do it without asking the permission of the States. The exercise of this right does not, however, exhaust the control of all of the waters of the country's streams or all that can be done with them. There is a residuum of general ownership or control in the States or in those persons who under State law have acquired rights in respect to the water. The countless instances of the use of stream waters everywhere by owners of riparian lands in the States of the East and Middle West and by the appropriators of water in the States of the West, where the priority or appropriation system of water rights prevails, attest indisputably to the existence of this residuum of water ownership or control that is beyond the reach of the Federal Government. This general ownership or control in the States has the support of the highest judicial authority. In *Kansas* v. *Colorado* (206 U. S. 46), which involved the Arkansas River, it was held by the Supreme

Court of the United States that where the interstate commerce clause of the Constitution, with its resulting right to protect navigation, is not involved the powers of the States over the waters within their boundaries are supreme just by virtue of their simple statehood as members of the Union. In *Nebraska* v. *Wyoming* (295 U. S. 40), which involved the North Platte, the same Court decided that claims of the Government to water within the boundaries of a State for irrigation are like the claims of private citizens, in that whatever would bind the State and its citizens in respect to the use of water as against another State and the latter's citizens upon an interstate stream would bind equally the United States, just as if it were a private water user, and that in a suit where interstate commerce is not involved the United States is sufficiently represented by the State and cannot intervene as a party to the suit.

In the 17 States of the West where the priority or appropriation system of water law prevails there are 7 that claim that mere admission to the Union itself gives them, except where interstate commerce powers of the Federal Constitution are involved, the right of ownership or control over their respective water—a position approved by the Supreme Court in Kansas against Colorado, above cited.

Then there is the case of *California-Oregon Power Co.* v. *Beaver Portland Cement Co.* (295 U. S. 142) in which the Supreme Court held that the Congress by act of July 26, 1866, which was the act opening up the mineral portion of the public domain to private purchase, and by the Desert Act of 1877, the Congress of the United States had turned over whatever interest it had in the waters to the States. This transfer of ownership or control did not involve, of course, any surrender by the Federal Government of the powers which the Congress has under the interstate commerce clause, but surely this transfer having been made cannot now be recalled.

In the 31 States of the East and Middle West where the riparian system of water law is found, the ownership of the right to water, to the extent not affected by the interstate commerce clause is, under State law, in the owner of the riparian lands bordering upon the streams. In the appropriation States it is, under State law, in the appropriator. Under both systems of water law the general control is in the States. If the United States happens to own land bordering upon a stream in the former case, or is an appropriator in the latter case, then the United States like any private person is the owner of a right to water but holds its right under the law and authority of the State. If in the appropriation or priority States there are waters not yet appropriated, the general right to authorize the appropriation thereof is not in the United States but in the State.

In the section of the bill above quoted (sec. 203 (a)) the "reclamation of the public lands" is one of the declared functions of the authorities. Water to reclaim public lands has nothing to do with functions or objectives relating to interstate commerce either by way of promoting navigation or controlling floods or otherwise. The right of the Govern-

ment to water wherewith to reclaim its public lands is a good example of a right that, when coming into existence, is created by the State in favor of the United States just as if it would be in favor of any private individual who acquires a right to water to reclaim his own lands.

Neither riparian nor appropriation States are likely to subscribe to the bill's assertion of ownership, control, and disposition in the Federal Government or to the bill's vast plans for any integrated development of the stream system as a whole regardless of State lines and State authority. Rather will the States themselves want to determine their water future and thereby the future of the industries dependent upon it.

The powers the States do not give up they still retain.

Many of the functions of existing Federal agencies would be curtailed or duplicated

The planning agencies are required, after investigation, to formulate plans for the general development of the water, soil, forest, and mineral resources of the country (secs. 4, 5, and 6). This requirement would be at best a duplication of the work of the other instrumentalities of the Government including the Bureau of Reclamation of the Interior Department, the Corps of Army Engineers of the War Department, and the Soil Conservation Service of the Department of Agriculture, which both plan and execute. At its worst, the requirement would indicate that the functions of these other Federal instrumentalities are to be superseded.

In either event the planning functions would be better performed if they could remain where they are now, since they demand a high order of centralized research and experience and also because the present instrumentalities have the country's confidence. Not only would the planning instrumentalities be either curtailed or duplicated, but there would be an abridgment of the functions of the other Federal instrumentalities in respect to the transfer to the Power Authorities of projects, or parts of projects, that are now or hereafter would be controlled by the other Federal instrumentalities if the bill were not passed (sec. 201 (a) 203 (a) (b)).

Under the present law the Bureau of Reclamation, primarily in charge of the reclamation of lands, frequently generates and disposes of power as a byproduct; and the Corps of Army Engineers in charge of dams for the purpose of navigation and flood control does, and plans to do, the same thing likewise as a byproduct.

By way of further particularity concerning curtailment and duplication it may be added that under the Mansfield bill the Power Authorities are given the right to construct and control such "facilities capable of producing hydroelectric power" together with "appurtenant works" as may be entrusted to them by any act of the Congress, the only exception being that if the facilities are in any way associated with the promotion of navigation and have "locks, lifts, fishways and navigable

facilities in connection therewith" these latter shall be operated by the War Department (sec. 203 (a) (b)).

The President by Executive order may transfer to such a Power Authority "facilities capable of producing hydroelectric power (together with appurtenant works constructed, under construction or hereafter to be constructed by, or on behalf of the United States," meaning by any other agency or department of the United States (sec. 201 (a)). "Facilities * * * together with appurtenant works" is a phrase broad enough to include dams, release gates, spillways, penstocks, dynamos—practically the entire control of a dam project—even though the project is one performing the multiple functions such as controlling floods, supplying water for irrigation, and municipal purposes as well as generating power.

The only exception to the control of the entirety of the project by the Power Authority, as far as concerns the operation of the dam or the impounding and release of water for the various purposes of the project, is that if the promotion of navigation is connected with the project then "locks, lifts, and fishways and the navigation facilities employed in connection therewith are to be operated by the War Department" (sec. 203 (b)). Apparently flood control itself goes along with the "facilities" and "appurtenant works" to the power authorities.

At any rate that particular function is not expressly exempted from the control of the power authorities. Just how it is going to be practically feasible for the different instrumentalities of the Government to impound and release waters at the same time when the functions are various and when they conflict as to their respective necessities, the bill does not explain. Where the generation of power is only one of several functions it should be looked upon as a byproduct as compared with the others and, in the frequent conflicts of exercise, should be subordinated. This subordination would not be any too likely to be given effect when the transfer of the other project is to an unsympathetic power authority whose primary purpose is power generation.

From these considerations it appears that if the bill were passed, the functions of important existing Government instrumentalities, including the Corps of Army Engineers, Bureau of Reclamation and Soil Conservation Service would be curtailed or duplicated in planning, execution, and administration.

The bill either abridges or authorizes plans which, if executed, would abridge functions of the States or their agencies, either by limitation or duplication.

The States could not, if the bill were passed, authorize towns and cities, mines, mills, and factories "to pollute or to make unsightly waters of or flowing into navigable streams or other streams over which the Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States" (sec. 8). Since most streams, if not themselves navigable, flow into streams that are navigable, the practical universality in effect of such a prohibition is apparent.

State water-administration officials, State planning commissions formulating plans for the utilization of the water, soil, minerals, and forest resources of the country are not assured with certainty of consideration by these super-regional planning agencies, since the latter need cooperate with the States only "insofar as practicable," which means insofar as the planning agency itself deems practicable (sec. 4 (c)).

State utility commissions could not fix the rates on electric energy, since these are to be determined by the Federal Power Commission, upon which great areas of the country would not be represented (sec. 203 (f)).

States could not negotiate interstate compacts without the consent of the President (sec. 7), whereas under the Constitution the States have a right to invoke the consent of the Congress, and in that body have direct representation for their protection.

State courts are ousted of all jurisdiction over the power authorities (sec. 207 (a) (b)).

The powers the States don't give up they still retain.

The bill fails to insure with certainty the opportunity of States to be heard on plans to be submitted to the President

While projects of one kind and another for conservation of water, soil, minerals, and forests are not to be constructed or carried out without future appropriations of money by the Congress, yet the plans themselves for the projects may be submitted to the President and by him to the Congress without assured requirement that a State affected by the plans would be heard by the planning agency. True the bill directs the agency to "consult and cooperate with the States" * * * "insofar as practicable" (sec. 4 (c)). What is "practicable," however, is apparently left to the agency to decide, whereas every State that is affected by a plan to be presented to the President should be assured with certainty of the right to be heard by the agency before the plan is submitted.

Plans submitted by the agencies will carry prestige—perhaps, too much to counteract on account of the sources from which they come. It is important, therefore, that the State be heard on the plan before the President is expected to submit it to the Congress. Since the bill contemplates that the plans may be extensive enough to call for a coordinated or integrated development (bill, sec. 4 (b)) of the entire region of an agency as a whole, and even regardless of State lines, it is all the more important that the agency should be required with absolute certainty to provide States with an opportunity to be heard before the plan goes to the President. Many of the States have planning commissions and other State officers well qualified to advise and to be helpful to the agency in these matters.

The powers the States don't give up they still retain.

The bill apparently gives no consideration to the reclamation of private lands by irrigation

The planning provisions of the bill authorize the regional planning agencies to prepare and submit to the President plans providing, among other things, for the "reclamation of public lands" (sec. 1, 5 (a), 6 (b)). No mention is made, however, of plans that would include the reclamation of private lands. The right of private land owners to buy water is left in doubt; yet all through the West they, as well as homesteaders on public lands, have been allowed under the Reclamation Act of 1902, as administered by the Bureau of Reclamation, to buy water from the Government project for their privately owned lands. Can it be that this apparent change in policy is intentional?

The point is not of much importance since other objections to the bill are so many and so insurmountable that the one under consideration for failing to provide for the reclamation of private lands, as well as public, would not atone for the other objections. Perhaps the chief value of the particular objection is that it shows that the drafters of the bill had little comprehension of reclamation problems and practices and of the needs of the West.

The bill fails to subordinate its regional power authorities in any respect to the law of the States in making appropriations and uses of water and in operating power plants.

The Congress may authorize the Federal construction and control of a dam in a stream within a State as against the will of that State and without regard to its laws, only in promoting navigation for the purpose in turn of promoting interstate and foreign commerce and in aid of national defense.

There are in the Federal Constitution no other grants of power to the Federal Government from which the authority to override or disregard the will of a State in respect to its waters may be deduced.

The evident purpose of the bill, however, is to build and operate power plants rather than to promote interstate commerce through improving navigation, or the national defense. If interstate or foreign commerce or the national defense are in any way invoked to support the power program it is only as a technical camouflage for the real purpose, which is the generation and distribution of power.

Regional power authorities may be created by Executive order under the bill "whenever in his (the President's) judgment the national public interest and the interests of economy and efficiency will be served thereby." Section 201 (a), "Public interest," and the "interests of economy and efficiency," do not chance to be found among the grants made by the Constitution to the Federal Government. What is found, and very properly so, is the promotion of interstate and foreign commerce, also the promotion of national defense. That electrical energy may be generated as a byproduct at a Government dam, built and operated in the streams of a State for either of the two primary constitutional

purposes mentioned, is certain, but that it can't be done otherwise is equally certain.

There are a number of instances where the Government, under the Reclamation Act of 1902, has built dams in the streams of a State for the purpose of irrigating the public lands as the primary purpose and where the Government generates power as a byproduct but this use of the waters of a State, there being no question of commerce or national defense involved, is in pursuance of the laws of the State just as it would be if a private person or company were to build the dam and operate the power plant. Indeed, the Reclamation Act itself by section 8 recognizes the superior authority of the State and directs the Government to proceed under the laws of the State.

Of the 48 States, 17 maintain an appropriation or priority system of water law. The fundamental principle of that system is that the appropriators or users of water take their respective supplies according to their relative dates of initiation of use—the oldest user having the prior legal right and the later users to take in order of seniority what is left—and that the water may be taken and used anywhere. Seven of these States contend that their very statehood gives them the authority to promulgate that system regardless of any consent of the Federal Government. Others of them claim that the Congress by the act of July 26, 1866 (the act opening up the mineral portion of the public domain to private purchase) and by the Desert Act, 1877, relinquished to the Western States the general control of the waters within their borders and thereby gave them the authority to establish that system of water law to whatever extent they desired (*California-Oregon Power Co.* v. *Beaver-Portland Cement Co.*, 295 U. S. 142).

The remaining 31 States maintain the riparian system of water law, the fundamental principle of which is, that without conclusive regard to any priority of use in point of time, each land ownership that borders the stream has a right to make a reasonable use of the water. This riparian system is predicated on the inherent authority of the State as a State, and therefore, in legal theory, the States maintaining the system are likewise exempt from Federal interference in the control of the waters except when the Congress exercises its constitutional powers either to promote interstate and foreign commerce or the national defense. These exceptions are, of course, applicable to the priority system also.

In truth, then, under the water law of the country the general control is in the States and the exceptions are in the Federal Government. The bill, however, recognizes no authority, not even by way of exception, in the States.

The powers the States don't give up they still retain!

The bill offers no assurance that in the priority or appropriation States of the West a power authority would not create water priorities in one State at the expense of water interests in another.

The appropriation or priority system of water law is found in 17 States of the West. As among appropriators of water he who first puts the water to use has a prior legal right thereto as against later users, to the extent of the necessities of his use, and he who is second in time is second in right, and so on throughout the series of appropriators. Whether there is anything for the latest user in the series depends upon whether there is enough water left in the source of supply after first satisfying uses that are older. This is the law within the boundaries of a priority or appropriation State.

What the law is as between States where the stream is an interstate stream is a question, the answer to which has not yet been made clear by the United States Supreme Court. In other words, the question is whether the rule that would be applied is that of "priority regardless of State lines" as was laid down, with certain modifications, in the case of *Wyoming* v. *Colorado* (259 U. S. 419) or whether it would be "equitable division" which is a rule that would guarantee to each State a fair amount of the water and which would do it without conclusive regard to existing uses, as announced in the case of *Kansas* v. *Colorado* (206 U. S. 46). There have been later cases decided by the United States Supreme Court in respect to interstate streams, but they still leave us in doubt as to the rule that would be applied. These later cases are *Connecticut* v. *Massachusetts* (282 U. S. 660) and *New Jersey* v. *New York* (283 U. S. 336).

In this confusion of the law no State possessed of careful regard for its water interests would want to run the risk of an authority establishing a major Federal project in a different State on the same interstate stream.

A project merely for power generation represents a nonconsumptive use of water and, if not retarding the flow and if in an upper State, would do no harm to a lower State on the same stream. If, however, the project is in a lower State then, although the use be nonconsumptive, yet the harm to the upper State is as great as if the use were consumptive, since under a rule of interstate priority the upper State could not, as against the project priority in the lower State, hold back water for a new and later use in the upper State.

It is unfair to use Federal money which is the money of all of the States to establish a Federal water project in one State at the expense of the water interests of another State on the same stream, unless there is an interstate agreement between the States, assuring to the State which does not receive the project a definite quantity or percentage of the waters of the common stream exempt from any claim of priority in behalf of the project so established.

The powers the States do not give up, they still retain.

The bill offers no assurance that in the riparian States of the East a power authority would not establish water projects in one State at the expense of the water interests in another.

Thirty-one States, chiefly lying east of the Missouri and the Mississippi Rivers, maintain within their respective boundaries, as among their respective water users, the riparian system of water rights, as distinguished from the priority or appropriation system. The fundamental principle of that system is the equal right of each water user to make a reasonable use of the waters of the stream without conclusive regard to the age of the different uses.

Existing uses are considered as among the factors in determining what a reasonable use would be, but they are not factors entitled to a conclusive regard or effect, as they would be under the appropriation or priority system. As between one riparian State and another upon the same interstate stream the rule is that the water users of each State are entitled, as against the water users of another State on the same stream, to make a reasonable use of the waters, in other words, to an "equitable division." *Conn.* v. *Mass.*, 282 U. S. 660; *New Jersey* v. *New York*, 283 U. S. 336. Since, however, existing uses are factors to be considered, although not conclusive in effect, it follows that in determining the "equitable division" as between riparian States, an existing use cannot help but have some weight. A State that receives from a power authority a major water project, accordingly obtains thereby, practically speaking, at least an advantage against the water interests of other States upon the same stream.

Then, too, it is to be remembered that where the Government constructs a project in one State it is not likely, until it gets its money back, to invest in another in a different State on the same stream. Reimbursement may require many years and therefore may delay correspondingly development in that other State. The only proper way for the Government to proceed is to exact an interstate compact dividing the interstate stream in terms of quantity or percentage between the States before financing a major water project in one of them to the injury of another. This the Government could do easily, for, holding the money bags, the Government could refuse a State that wants the project unless the State enters into a compact with the other States for a division of water recommended by the Government, and could threaten the other States that the project would be given anyway if the recommended division should be refused by them. A riparian State, therefore, having regard to its own future water development, should not run the risk of allowing major projects to become established in other States on the same stream until there shall have been formulated between them an interstate compact determining the percentage or quantity of water which the State or States not receiving the project are to have. It is not fair to use Federal money to forward one State at the expense of the water interests of another.

The powers the States don't give up they still retain.

The bill arbitrarily prohibits the pollution of streams by mining, milling, and manufacturing industries and by municipalities regardless of effect on interstate commerce.

By section 8 of the bill "it shall be unlawful for any person by any sewer pipe outlet or other means, devices, or practices to pollute or make unsightly waters of, or flowing into, navigable streams or other streams over which the Congress has jurisdiction under its authority to regulate commerce of foreign nations and among the several States."

This prohibition purports to be absolute, and it is nearly as broad as it is absolute, for most streams either are navigable or else are tributaries of streams that are navigable. Apparently it makes no difference whether the pollution does any harm to the national defense or to commerce among the States and with foreign nations, the protection of which and the national defense are the only constitutional sources of the authority of the Congress over the waters of the country. Again, there is no provision for consent to the pollution even when interstate and foreign commerce and the national defense are not interfered with. Since the prohibition runs against "any person" it runs against mining, milling, and manufacturing industries, and also municipalities. Industries and municipalities cannot be operated without polluting to some extent the country's streams. Can it be that those industries and those municipalities are now to abstain from even necessary pollution and, therefore, to cease operation? Or shall the Government refrain from interference save when interstate and foreign commerce or the national defense are interfered with? The prohibition of the bill extends not only to navigable streams but to their tributaries as well. Better by far to leave the question of pollution when interstate and foreign commerce and the national defense are not involved, or actually interfered with, where it is now—in the States themselves. They best can determine the extent of pollution that is necessary and suppress the unnecessary. They best can look after the public health of their peoples. If a stream is interstate and if one State pollutes unduly as against another State upon the same stream, the latter has its remedy in the Supreme Court of the United States, which will formulate and apply the proper rule.

The bill in prohibiting all pollution goes as far as to direct the Attorney General to proceed against the polluter and to authorize a temporary injunction without bond. Can it be that the industries are to be closed perhaps unlawfully during the temporary injunction period without reimbursement for damages suffered?

The powers the States do not give up they still retain.

Power projects

The bill authorizes its regional power authorities to construct and operate power plants and transmission lines and to distribute and sell electric energy at wholesale or retail (sec. 203 (a), (b), (c), (d), (e)). The President by Executive order may create as many of these power

authorities, and without regard to the boundaries of the seven regions, as he may deem best in the public interest, subject to the limitation that he shall "create or establish no more than one regional power authority for the administration of hydroelectric facilities and appurtenant works which are, or may be, economically interconnected by transmission lines" (sec. 201 (a)).

Unconfined as the President would be to the boundaries of any one of the seven regions which are taken as the units for general planning purposes under the planning portion of the bill, free as he would be to establish as many of these authorities as he may desire save for the limitation mentioned, it is evident that Government plants are no longer to be introduced, as once stated, merely for "yardstick" purposes here and there, but rather that they are gradually to absorb the entire field of market demand as rapidly as possible. A further evidence of this fact is to be found in the provisions to the effect that where the Government sells power at wholesale for redistribution the public agencies such as States and municipalities and cooperatives are to be preferred over private purchasers (sec. 203 (d)).

Opinion on the wisdom of this course depends upon how socialistically inclined the owner of the opinion may be. If he favors governmental competition with privately owned but publicly regulated power projects, he will favor this function of the authorities with all of its completeness; otherwise not. Or, if he favors the generation of energy by the authorities, but on account of the great number of employees needed and the danger of political operation he is opposed to having the Government, through these agencies, engage in the distribution of the energy generated, he will favor the generation but oppose giving the authority more than the right to generate and to wholesale the energy generated, thus leaving the distribution among consumers to some private distributing agencies under public regulation. So, too, if, for much the same reason, he is opposed to discrimination against private purchasers in favor of public, he will be opposed to the bill.

The negotiation of interstate compacts would be undesirably and unconstitutionally interfered with

Where streams are interstate and the question arises as to how the waters are to be divided between the States and their respective peoples, the States either settle the question by interstate agreement negotiated by their official representatives with the consent of the Congress, or else settle it by suit between the States in the Supreme Court of the United States. These are the constitutional methods (Federal Constitution, arts. I, sec. 10 (2), and III, sec. 2 (1)).

Under the bill an interstate agreement must be approved by the President (sec. 7). The President, in nearly all cases, could not by any possibility be coming from the States affected, and he might have other ideas than those of the States concerning the agreement. When, however as now, the Congress is the one to give or withhold consent to an

interstate compact, the matter not only goes first to a committee where the States may be heard, but they have in the Congress their Senators and Representatives perfectly capable of representing and protecting their interests, more capable, indeed, than any one else.

Under the bill (sec. 7) as worded, if constitutional, no further legislation would be required to take from the States the power to make interstate compacts free from the consent of the President. The constitutionality of the bill on this point may well be doubted. The power to approve or disapprove interstate agreements is a vital one. The framers of the Constitution put it in the Congress not in the Executive (Constitution, art. III, sec. 2 (1)). Very likely a power so important cannot be delegated lawfully. Certainly wisdom suggests it be left where it is—in the Congress where the States affected can always be heard by committees and receive the protection of their Senators and Representatives.

The powers the States don't give up, they still retain!

The Administrator and the directors of the Power Authorities might be unfamiliar with and unfriendly to the regions to which appointed

Under the bill the Presidents are to appoint the Administrator of the Authority with confirmation by the Senate (sec. 201 (d)). They are to appoint the directors also but without necessity of confirmation (sec. 201 (e)). There is no requirement that any of these appointees shall come from the different States constituting the power region to which assigned. Since the directors could be appointed without confirmation by the Senate, they could go into the power regions as political carpetbaggers.

The powers the States don't give up they still retain.

The bill requires the Authorities to classify their proposed projects for construction in order of urgency in point of relieving unemployment

Section 6 (d) of the bill provides "Plans shall classify the various construction projects with a view to the construction of projects in the order of their urgency, so as most beneficially to promote the national welfare by stabilizing employment and relieving unemployment."

Undoubtedly there would be some projects of one kind or another which, if constructed in one State, would do no direct or particular harm to other States not receiving them, and as to which projects the urgency of providing employment might well be taken into consideration; for it is to be remembered that the various projects in respect to which the authorities are to plan and which the authorities may operate, concern the conservation of the soil, minerals, waters, and forests of the Nation. When, however, the natural resource is what by nature is a common resource such as an interstate stream, and when we reflect that under the law governing the division of interstate waters between States and their respective peoples there is no certainty that the State receiving the authority's water project would not, thereby, acquire a

water priority in the priority or appropriation States, or a water advantage in the riparian States against other States not receiving it, then the folly of constructing in the order of urgency of employment of workers as distinguished from advancing and protecting the real present and future interests of States in respect to their waters, becomes apparent at once. No major project intended to put water to beneficial use should be built upon an interstate stream with Federal money (Federal money is the money of all of the States) unless the Government rquires from the State which is to receive the project an interstate agreement with the other States not receiving it, guaranteeing them a quantity or percentage of interstate water undiminished by any claim in favor of the project. In all such cases the Government by reason of holding the purse, can quite easily extract the agreement, for the Government can inform the State supposed to receive the project, that the project will not be constructed unless an agreement is made with the other States guaranteeing to them a certain percentage or quantity of water, and can inform the other States that if they do not agree to the quantity or percentage suggested by the Government that then the project will be constructed anyway. Thus, through the power of the purse, the Government can exact an interstate agreement if it wants to do so.

Where Government money is not involved in the development of water projects on interstate streams but only the money of States or their subdivisions, or their citizens, the States, of course, are to try without compulsion to reach an interstate agreement, or, failing that, they may take their differences to the United States Supreme Court.

The powers the States do not give up they still retain.

The bill indicates a movement to center the control of the economic life of the country very largely in a succession of Presidents through regional instrumentalities amenable to their will.

The following points are to be noticed in the bill:

First. That the director and members of the planning agencies and the directors of the power authorities are to be appointed by the President, and the agencies and authorities are to be controlled by the President (secs. 3 (b), (c), 4 (a), 201 (e)). Through the citations referred to, it appears expressly that the planning agencies are to be thus controlled. As for the power authorities, the control would be similarly held because of the fact that the directors of the power authority, who by vote would control the policies of the Authority, are to be appointed by the President without fixed terms and without confirmation by the Senate (sec. 201 (e)).

Second. That the President may change the boundaries of any of the seven regions without consulting the Congress. Section 2.

Third. That he may create power authorities without regard to the boundaries of the seven regions and in such number and in such places as he may deem best and do it without consulting the Congress and may control them after he creates them. Section 20.

Fourth. That he may without consulting the Congress transfer to the power authorities, and therefore to be similarly controlled by him, the "facilities capable of producing the hydroelectric power (together with appurtenant works) constructed, under construction or hereafter constructed by or on behalf of the United States," meaning by any other branch of the Government. Section 201 (a). Since power generating "facilities" would include all the physical structures and equipment necessary to power generation, and since if there were any doubt about that point, the doubt is dispelled by the precautionary phrase "appurtenant works," it follows that the President could transfer practically the entirety of any other Government project as far as concerns dam, spillways, outlet gates and valves, powerhouse, and generators to the control of a Power Authority and, therefore, to the control of the President, if only the generation of power happens to be any one of a number of functions served by the project transferred.

Fifth. Under the planning provisions of the bill, the planning agencies are to plan, under the President's control, for the conservation and development of the soil, forest, mineral, and water resources of the country and for the improvement of navigation and control of floods, and are to do all this by regions (secs. 4 (b), 5 (a)). Such provisions imply the probability that, sooner or later, an effort will be made to create corporate regional instrumentalities and to invest in them the duty of carrying out the plans by constructing and operating the necessary projects and activities. In that event these corporate regional instrumentalities would be similarly subject to the control of the President. The bill already contemplates the transfer of certain other projects to its power authorities (sec. 201 (a)). It would be easy to create seven regional corporate authorities and transfer to them all projects within their borders. Indeed, why the planning by the seven regions, if there are not to be seven regional authorities to carry out the regional plans and operate the regional projects? The one seems to imply the other. Already there is a pending bill containing similar planning provisions, known as the Norris bill, S. 2555, that contemplates just such regional authorities. Doubtless more such bills would follow if the Mansfield bill were to pass. And if such regional authorities were to come they would bring with them their additional restrictions upon the States, including even the prohibition against putting dams in streams, in other words, against making new uses of water, without the consent of the authorities.

Sixth. Many functions of the States would be taken from them, as already more specifically mentioned.

These considerations support the conclusion that the bill indicates a movement to centralize economic control in great degree in the successive Presidents of the United States. This centralized control, this subjection of the States, this curtailment and usurpation of their functions are, in the present instance, more than unnecessary. They are in their trend a denial of representative democracy. Representative democracy does not consist in popular election alone. It requires fully as

much active participation by the elected representatives sitting in legislative assembly in the determination of the policies and objectives and laws under which the people are to live and which it is the function of the Executive to carry out.

The powers the States don't give up, they still retain.

HOW TO PRESERVE THE GOOD IN THE BILL

The bill contains some good, and what it does contain ought to be preserved. The bill itself, however, is not necessary to the preservation. In fact, it stands in the way because of its curtailment of the functions of various agencies of the Government and because of its encroachment upon the rights of the States.

The good contained in the bill consists of its idea of comprehensive planning for the development and use of our natural resources. Stream systems, for instance, ought to be developed in such wise as to make sure that each State receives the use of an equitable part of the water as against the claims of other States on the same interstate stream. When, to accomplish this division and protection, interstate compacts are necessary, the compacts should be negotiated under the auspices and recommendation of the Federal Government and then submitted to the States affected and to the Congress for ratification.

The general planning should be done by the Government in cooperation with the States. For this purpose the Government has plenty of existing agencies: The Reclamation Bureau, Corps of Army Engineers, Soil Conservation Service, Forest Service, Federal Power Commission, and the National Resources Committee. Federal regional instrumentalities such as are set up by the bill are unnecessary either to plan or carry out plans. The existing Federal agencies can develop the plans in cooperation with the States. The plans then can be presented to the Congress, be discussed in the committees, receive the consideration of the Senators and Representatives, the Governors, attorneys general, and water officers of the affected States. There is no need of creating the proposed regional instrumentalities, which would impair existing Federal agencies, encroach upon the rights of the States and centralize economic and political control in a succession of Presidents. The course recommended would create no new bureaus or instrumentalities, would cost less, and would be more in the public interest.

LEGAL STENOGRAPHERS

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QUITE a number of young women have come to the Denver Junior Consultation Center who are interested in becoming legal stenographers. Occasionally the employment and aptitude tests of the Center indicate that these young